LOH ENG LEONG & ANOR

v.

LO MUN SEN & SONS SDN BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
HASHIM YUSOF JCA
BAHARUDIN SHAH JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: A-02-661-1998]
11 AUGUST 2003

CIVIL PROCEDURE: *Contempt of court - Order for committal, application for - Indorsement of penal notice on order of court - Whether order complied with procedural requirements under O. 42 r. 6(2) of the Rules of the High Court 1980 - Whether application had merits - Rules of the High Court 1980, O. 42 r. 6(1), (2), O. 45 rr. 5, 7*

The appellants, who had obtained an order of court against the respondents for a direction that the Register of Members of Lo Mu Sen & Sons Sdn Bhd ('the Register of Members') be rectified pursuant to s. 162 of the Companies Act 1965 ('the order'), filed an application for leave to commence committal proceedings against the respondents for breaching the order. The order did not specify the time within which the Register of Members must be rectified. The appellants, realising that they were hampered by the absence of a penal notice in the order, filed an *ex parte* notice of motion requesting leave to indorse the penal notice in the order. The respondents applied for an adjournment on the ground that the application ought to have been made *inter partes* and that they should be heard before any order was made. Although this court agreed that the application ought to have been made *inter partes*, it was appropriate to first determine whether the appellants' application had any merits before considering the respondents' request for adjournment.

Held:
Per Augustine Paul JCA

[1] A failure to indorse an order of court with a penal notice is fatal to an application for committal proceedings. Orders 42 r. 6(1), (2) and 45 rr. 5 and 7 of The Rules of the High Court 1980 ('RHC') provide for instances where an order of court can be indorsed with a penal notice pursuant to which an order of committal can be made. However, in this case, the order was not one that fell within O. 42 r. 6(2), but rather r. 6(1), of the RHC. Since the order was one that must be done within a prescribed period, the

time period must have been specified in it before it could be enforced. On the facts, there was no compliance with this requirement as the time period within which the act must be done had not been specified; furthermore, there was no supplemental order to fix a time period. The corollary was that the appellants were not entitled to have the penal notice indorsed on the order. Since the application was without merit, it was dismissed without the need to consider the adjournment as requested by the respondents. (pp 746 g-h & 751 c-d)

[Application dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu, yang memperoleh perintah mahkamah terhadap responden di bawah s. 162 Akta Syarikat 1965 ('perintah') memerintahkan supaya pembetulan dibuat pada Daftar Ahli Lo Mu Sen & Sons Sdn Bhd ('Daftar Ahli'), telah memfail permohonan untuk kebenaran memulakan prosiding komital terhadap responden kerana mengingkari perintah. Perintah, bagaimanapun, tidak menetapkan tempoh masa dalam mana Daftar Ahli tersebut harus diperbetulkan. Merasakan diri mereka dihalang oleh ketiadaan notis hukuman di dalam perintah, perayu memfailkan notis usul *ex parte* memohon kebenaran untuk mengindors notis hukuman di dalam perintah. Responden memohon penangguhan atas alasan bahawa permohonan harus dibuat *inter partes* dan bahawa mereka harus didengar sebelum apa-apa perintah dibuat. Walaupun mahkamah ini bersetuju bahawa permohonan seharusnya dibuat *inter partes*, ia merasa wajar untuk memastikan dahulu sama ada permohonan perayu mengandungi merit sebelum menimbang permohonan penangguhan responden.

Diputuskan:
Oleh Augustine Paul HMR

[1] Kegagalan mengindors suatu perintah mahkamah dengan notis hukuman adalah fatal kepada suatu permohonan untuk prosiding komital. Aturan-Aturan 42 k. 6(1), (2) dan 45 kk. 5, 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menyenaraikan keadaan-keadaan di mana sesuatu perintah mahkamah boleh diindors dengan notis hukuman berikutan mana suatu perintah komital boleh dibuat. Namun, dalam kes semasa, perintah bukanlah sesuatu yang terangkum ke dalam A. 42 k. 6(2), sebaliknya ke dalam k. 6(1) KMT. Oleh kerana perintah tersebut harus dibuat dalam jangka waktu yang ditetapkan, maka jangka waktu tersebut hendaklah dinyatakan di dalamnya sebelum ianya boleh dilaksanakan. Berdasarkan fakta, tidak terdapat pematuhan kepada keperluan ini, oleh kerana tempoh masa dalam

mana tindakan harus diambil telah tidak dinyatakan; lagipun, tidak wujud perintah sampingan bagi menetapkan tempoh masa. Ianya mengikut bahawa perayu tidak berhak untuk mengindors notis hukuman kepada perintah. Permohonan jelas tidak bermerit, dan kerana itu harus ditolak tanpa perlu menimbang permohonan penangguhan responden.

Permohonan ditolak]

Cases referred to:

Allport Alfred James v. Wong Soon Lan [1989] 1 CLJ 271; [1989] 2 CLJ (Rep) 852 HC ***(refd)***

General (Rtd) Tan Sri Hashim Mohd Ali & Anor v. Francis MG Mirandah [2000] MLJU 436 ***(refd)***

Grenek Sdn Bhd v. Lew Wa Chow [l991] 1 MLJ 125 ***(refd)***

Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd [2003] 1 CLJ 317 HC ***(refd)***

Hitachi Sales (UK) Ltd v. Mitsui OSK Lines Ltd [1986] 2 Lloyds Rep 574 ***(refd)***

Leow Seng Huat v. Low Mui Vein [l996] 2 BLJ 466 ***(refd)***

Nicholls v. Nicholls [1977] 147 NLJ 61 ***(refd)***

Van Houten v. Foodsafe Ltd [1980] 124 SJ 277 ***(refd)***

Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd [1996] 5 MLJ 127 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 162

Rules of the High Court 1980, O. 2 r. 6(1), (2), O. 42 r. 6(1), O. 45 rr. 5(1), 7(2), (4)

Other source(s) referred to:

The Supreme Court Practice 1985, p 632

For the appellant - Cecil Abraham (Yee Mei Kean); M/s Shearn Delamore & Co
For the respondent - Yong Nyet Kim; M/s Kim & Assoc

[Appeal from High Court, Taiping; Civil Suit Originating Summons No: 24-51-1998]

Reported by Suresh Nathan

JUDGMENT

Augustine Paul JCA:

On 26 July 2001, the appellants obtained an order of court against the respondents for a direction that the Register of Members of Lo Mu Sen & Sons Sdn Berhad ('the Register of Members') be rectified pursuant to s. 162 of the Companies Act 1965 by striking out the name of Loh Eng Wah therefrom as the holder of 161 shares of the said company numbered under share certificates 0050 to 0053 both inclusive. It must be observed that it did not specify the time within which the Register of Members must be rectified.

The order of court was duly extracted and served on the respondents' solicitors on 15 October 2001. The respondents did not inform the appellants whether they have rectified the Register of Members as ordered. The appellants then realised that the order of court had been breached as the shares in question had been transferred to the second respondent on or about September 2002. This prompted the appellants to consider filing an application for leave to commence committal rjroceedings against the persons responsible for breaching the order of court. However, they realised that they were hampered by the absence of a penal notice in the order of court. Accordingly, they wrote to the deputy registrar of the court asking for the penal notice to be indorsed in the order of court. They were advised to apply formally to the court to have the indorsement. An *ex parte* notice of motion was then filed by the appellants asking for leave to indorse the penal notice in the order of court.

When the application came up for hearing before us on 7 August 2003, learned counsel for the appellants said that the deputy registrar ought to have indorsed the penal notice in the order of court. At this stage, learned counsel for the respondents, who was present, applied for an adjournment on the ground that the application ought to have been *inter partes* and that they should be heard before any order is made. Learned counsel for the appellants said that the application should properly be *ex parte* and that the order prayed for should be granted. With regard to the first observation made by learned counsel for the appellants, we were of the considered view that the deputy registrar acted properly in advising the appellants to obtain an order of court to enable him to indorse it with the penal notice as the draft stage of the order had passed. We agreed with learned counsel for the respondents that the application ought to have been *inter partes*. This is because the application is not one that involves the correction of a mere clerical mistake and the respondents must therefore be heard. Be that as it may, we felt that it may be appropriate to first determine whether the application had any merits before considering the request for adjournment.

It is true, as contended by learned counsel for the appellants, that a failure to indorse the order of court with a penal notice is fatal to an application for committal (see *Leow Seng Huat v. Low Mui Yein* [1996] 2 BLJ 466; *General (Rtd) Tan Sri Hashim Mohd Ali & Anor v. Francis a/l MG Mirandah* [2000] MLJU 436; *Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd* [2003] 1 CLJ 317). The Rules of the High Court 1980 ('the RHC') provide for the instances where an order of court can be indorsed with a penal notice pursuant to which an order of committal can be made. Reference is first made to O. 42 r. 6 of the RHC ('r. 6') which reads as follows:

(1) Subject to para. (2), a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time within which the act is to be done.

(2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any immovable property or deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order by virtue of para. (1), but the foregoing provision shall not affect the power of the court to specify such a time and to adjudge or order accordingly.

The requirements of r. 6(1) must be strictly complied with before a judgment or order can be erjtered on the ground of the failure of a party to do an act within a specified time. In other words, the judgment or order which requires a person to do an act must itself specify the time after its service or some other time within which the act is to be done. Therefore, an order in the form that 'unless' a party should do an act within a specified time without specifying the time after service or some other time within which the act is to be done is bad and judgment entered pursuant thereto is liable to be set aside (see *Van Houten v. Foodsafe Ltd* [1980] 124 SJ 277).

Order 45 r. 5 of the RHC ('r. 5') provides for the enforcement of an order of court by, *inter alia,* an order of committal. It reads as follows:

(1) Where:

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under O. 3 r. 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say:

(i) with the leave of the court, an order of committal;

(ii) where that person is a body corporate, with the leave of the court, an order of committal against any director or other officer of the body;

(iii) subject to ttie provisions of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under r. 6 requiring the act to be done within some other time, references in para. (1) of this rule to a judgment or order shall be construed as references to the order made under r. 6.

(3) Where under any judgment or order requiring the delivery of any movable property the person liable to execution has the alternative of paying the assessed value of the property, the judgment or order shall not be enforceable by order of committal under para. (1), but the court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the property to the applicant within a time specified in the order, and that order may be so enforced.

It will be observed that r. 5(1) provides that an order may be enforced by, *inter alia*, committal where it requires the doing of an act within a specified time. In commenting on r. 5, Mohamed Dzaiddin J (as he then was) said in *Grenek Sdn Bhd v. Lew Wa Chow* [1991] 1 MLJ 125 at p. 126:

> The effect of the above rule is clearly explained in T*he Supreme Court Practice 1985* at para 45/5/1 at p. 666 which states:
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> > This rule governs the methods for the enforcement by the Court of its judgments or orders in circumstances amounting to a contempt of Court. It applies to both positive and negative judgments or orders, those which require a party to do an act as well as those which require a party to abstain from doing an act, subject, however to this important qualification, that the coercive methods of enforcement under this rule cannot be employed to enforce a judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment or order, or by a subsequent order extending or abridging such time under O. 5 r. 5, or fixing such timd under r. 6.

Order 45 r. 7 of the RHC ('r. 7') deals with the conditions to be satisfied before an order can be enforced as provided by r. 5. It reads as follows:

(1) In this rule references to an order shall be construed as including references to k judgment.

(2) Subject to O. 24 r. 16(3), O. 26 r. 7(3), and paras (6) and (7) of this rule, an order shall not be enforced under r. 5 unless:

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in r. 5(1)(ii) or (iii) unless:

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of seizure and sale or against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served:

(a) in the case of service under para. (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under para. (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there must also be served a copy of any order made under O. 3 r. 5, extending or abridging the time for doing the act and, where the first mentioned order was made under r. 5(3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) An order requiring a person to abstain from doing an act may be enforced under r. 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

(7) Without prejudice to its powers under O. 62 r. 5, the court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

Rule 7(4) provides that it is only where the order of court is one that must specify the time period within which an act must be done that can be indorsed with the penal notice. Rule 7(2)(b) provides that an order shall not be enforced under r. 5 unless a copy of the order requiring a person to do an act has been served on him before the expiration of the time within which he was required to do the act. Rule 7(4) deals with the indorsement of the penal notice in the case of service under r. 7(2) informing the person on whom the order is served that if he neglects to obey the order within the time specified therein then he is liable to process of execution to compel him to obey it.

It is therefore clear tjhat where an order of court to do an act must specify the time within which an act is to be done then such time must be specified. It is only in such cases that there can be indorsement with the penal notice. As the indorsement with the penal notice is a prerequisite to the making of a committal order which involves the liberty of the subject it is particularly important that the relevant rules are duly complied with (see *Nicholls v. Nicholls* [1977] 147 NLJ 61; *Allport Alfred James v. Wong Soon Lan* [1989] 1 CLJ 271; [1989] 2 CLJ (Rep) 852). It follows that where no time period has been specified in cases where it should lave been done a penal notice cannot be indorsed on it. Such an order is irregular and unenforceable (see *Grenek Sdn Bhd v. Lew Wa Chow* [1991] 1 MLJ 125; *Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd* [1996] 5 MLJ 127). The party against whom the order is made is entitled as of right to have it set aside (see *Hitachi Sales (UK) Ltd v. Mitsui OSK Lines Ltd* [1986] 2 Lloyds Rep 574). However, the absence of a time period to do an act which falls under r. 6(1) is not necessarily fatal. It can be cured by a supplemental order (see *Grenek Sdn Bhd v. Lew Wa Chow*). In this regard, *The Supreme Court Practice 1985* says at p. 632:

When the order omits to fix a time, it is not thereby rendered ineffectual, but the court will make a supplemental order fixing the time, in the Ch D designated a 'four-day order,' although the time after service of the order is not always four days (*Needham v. Needham* [1842] 1 Hare 633). But, except in the case of a judgment or order for the payment of money to some other person, or for giving possession of land or for delivery of goods, until a time is fixed the order cannot be enforced (*Gilbert v. Endean* [1878] 9 Ch D 259, p. 266, CA; *Re Wilde* [1910] WN 128, CA; *Townend v. Townend* [1906] 93 LT 680, CA (a divorce case).

In this case, the order of court dated 26 July 2002 which requires the Register of Members to be rectified is not one that falls within O. 42 r. 6(2). As it is one that must be done within a prescribed period the time period must have been specified in it before it can be enforced. There is no compliance with this requirement as the time period within which the act must be done has not been specified. Neither was there a supplemental order to fix a time period. The corollary is that the appellants are not entitled to have the penal notice indorsed in the order. The application before us is therefore without merit. Accordingly, we dismissed it without the need to consider an adjournment as requested by the respondents.